

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 98-1232
)	
MICROSOFT CORPORATION,)	
)	
Defendant.)	
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STATE OF NEW YORK, <u>ex rel.</u>)	
Attorney General DENNIS C. VACCO,)	
<u>et al.</u> ,)	
)	
Plaintiffs and)	
Counterclaim-Defendants,)	
)	
v.)	Civil Action No. 98-1233
)	
MICROSOFT CORPORATION,)	
)	
Defendant and)	
Counterclaim-Plaintiff.)	
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PRETRIAL ORDER NO. 2

Upon consideration of the proposals of the parties for a further pretrial order to supplement Pretrial Order No. 1 of June 12, 1998, and in accordance with the proceedings in open court at the hearing of August 6, 1998, it is, this ____ day of August, 1998,

ORDERED, as follows:

MODIFICATION OF PRETRIAL ORDER NO.1

1. To the extent any provision of Pretrial Order No. 1 is inconsistent with any provision of this Pretrial Order No. 2, Pretrial Order No. 1 is modified or superseded and the applicable provision of the Pretrial Order No. 2 shall apply.

MANDATORY EXPERT DISCLOSURES AND DISCOVERY

2. No later than August 19, 1998, plaintiffs shall identify the expert witnesses they intend to call to testify at trial and, separately with respect to each witness so identified, shall produce the reports and other materials required under Fed. R. Civ. P. 26(a)(2)(A),(B). No later than August 21, 1998, defendant shall identify the expert witnesses it intends to call to testify at trial and, separately with respect to each witness so identified, shall produce the reports and other materials required under Fed. R. Civ. P. 26(a)(2)(A),(B).

3. Witnesses identified pursuant to the preceding paragraph may be deposed on or after August 24, 1998, provided that, (a) no such deposition may last more than one day without leave of Court, and (b) no such deposition shall occur later than September 3, 1998.

USE OF DEPOSITION TESTIMONY AT TRIAL

4. In addition to the maximum of twelve (12) witnesses per side to be called at trial, the parties may introduce as evidence excerpts of depositions taken in this action pursuant to paragraph 3 of Pretrial Order No. 1. Except for purposes of

proof of an admission by a party opponent or impeachment of a trial witness, such deposition excerpts may be introduced solely under the terms hereafter set forth:

a. As a general rule, deposition excerpts should be offered to prove only subordinate or predicate issues, such as authenticity of exhibits (where contested) or foundation evidence for direct testimony or expert opinion to be presented at trial. No party should expect to prove a genuinely contested issue of material fact solely by means of deposition excerpts.

b. Each side shall be permitted to designate a reasonable number of deposition excerpts of witnesses for introduction as evidence. Such designations will be filed with the Court and served on all parties at the same time as the parties are required to file the direct examinations of their trial witnesses. Counsel for the parties shall act reasonably and exercise good judgment in not submitting excessive numbers of designations, recognizing that the Court will disregard deposition testimony it deems immaterial, collateral, cumulative, or confusing.

c. No more than seven (7) days after receiving the initial deposition designations permitted under the preceding subparagraph, each side may file with the Court and serve on all parties rebuttal designations of deposition excerpts. Each such rebuttal designation must be directly responsive

to testimony included in the adverse party's initial deposition designations; to the extent such rebuttal designations are not directly responsive to the adverse party's initial designations, the Court may either entertain motions in limine to strike such non-responsive rebuttal designations or simply disregard them.

d. A party may not designate as evidence any portion of the deposition testimony of a witness that such party intends to call as a witness at trial, except as set forth below. A party shall be permitted:

- i. To include in its rebuttal designations excerpts of the depositions of a witness that such party intends to call as a witness at trial if such rebuttal designations (1) respond directly to initial designations made by the adverse party, and (2) are beyond the scope of the particular witness' previously described and/or filed direct testimony; and
- ii. To introduce portions of the deposition of a witness in lieu of the written witness declaration specified in Pretrial Order No. 1, ¶ 12, where that witness declines to cooperate in the preparation of a separate witness declaration. Alternatively, a witness who declines to cooperate in the preparation of a separate witness

declaration may be called as a "hostile" witness at trial.

e. All deposition excerpts submitted pursuant to this Paragraph shall be submitted only in transcript form and not in the form of videotaped excerpts, except as provided below.

TECHNICAL DEMONSTRATIONS AT TRIAL

5. Notwithstanding the requirement set forth at Paragraph 12 of Pretrial Order No. 1 that the direct examinations of all witness be "in the form of written declarations," each side shall be permitted to have one or more witnesses supplement prefiled declarations by presenting by videotape technical demonstrations relevant to the subject matter of the witness' pre-filed declaration, provided that, (a) the adverse party was represented at the making of the videotape; or (b) a description of the demonstrative presentations is included in the prefiled declaration; and (c) the adverse party is afforded the opportunity to review the videotape at least seventy-two (72) hours prior to the testimony of the witness at trial.

IDENTIFICATION OF WITNESSES/SUBMISSION OF DIRECT TESTIMONY

6. On August 21, 1998, all parties shall simultaneously file with the Court and serve to opposing parties a list of the witnesses that the party intends to call in its case-in-chief at

trial. Such list shall contain no more than twelve (12) witnesses.

7. The identification of witnesses called for by ¶ 6 shall not relieve the parties of obligations under Local Rule 209(b), and no more than two (2) witnesses appearing in the Pretrial Statement of a party shall be other than those disclosed pursuant to ¶ 6.

8. Each side shall be permitted to call no more than two (2) rebuttal or surrebuttal witnesses after the close of defendant's case-in-chief. Rebuttal and surrebuttal witnesses need not be disclosed in advance.

9. At any time after the identification of a witness but before the commencement of trial, a party may depose trial witnesses of the adverse party if such witnesses have not previously been deposed in this action.

10. A party may alter its final witness list in its Pretrial Statement only with leave of Court and a showing of good cause to prevent manifest injustice.

11. Plaintiffs shall file the direct examinations of their witnesses, with the exception of hostile witnesses, in the form of written declarations on or before September 3, 1998.

12. Defendant shall file the direct examinations of its witnesses, with the exception of hostile witnesses, in the form of written declarations on or before five (5) days prior to the

date on which the Court and counsel anticipate plaintiffs' case-in-chief will be completed.

Thomas Penfield Jackson
U.S. District Judge